ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISIONS IV & I

CA07-689

February 20, 2008

MARY JONES
APPELLANT

V.

CITIBANK SOUTH DAKOTA, N.A.
APPELLEE

APPEAL FROM THE GARLAND COUNTY CIRCUIT COURT
[CV-05-1089-1]

HON. JOHN HOMER WRIGHT, CIRCUIT JUDGE

REVERSED and REMANDED

Appellant Mary Jones appeals the judgment of the Garland County Circuit Court in favor of appellee Citibank South Dakota, N.A. (Citibank) for $10,741.50 plus interest and attorney fees. The primary issue on appeal is whether Citibank satisfied its burden of proof. We reverse and remand.

In 1988, Citibank issued a credit card to Mary Jones at 1 Emanuel Dr., Hot Springs Village, Arkansas, and the evidence introduced at trial reflected that since that time charges have been made and statements have been mailed to that address. The records of Citibank further indicated that over the years payments were made on the account and that the account was paid down to a zero balance on several occasions. In 2003 or 2004, payments stopped, and the account balance, with finance charges, reached $10,741.50 (the credit limit on the account was $10,000). The records of Citibank do not reflect that there was ever any notice given that

Jones challenged any charge to the account. After introducing the testimony of its litigation analyst, Citibank rested. Jones (who did not attend the trial) moved for a dismissal, but the trial court denied the motion. Jones rested without putting on any evidence. Ultimately, the trial court found that Citibank met its burden of proving, by a preponderance of the evidence, that the debt had been proved and granted judgment in favor of Citibank.

Jones raises several sub-points for appeal under the heading that the trial court erred in finding that Citibank had met its burden of proof.[1] Specifically, Jones alleges:

1. A card issuer does not meet its burden of proof by merely introducing its own statements of accounts;
2. The statements introduced by the card issuer were hearsay, and it was error to admit the statements into evidence;
3. Citibank's sole witness was not a "qualified witness" to present the requisite testimony to introduce Citibank's statements; and
4. Citibank failed to provide any evidence indicating that there was an agreement to the terms of the account sued upon.

In bench trials, the standard of review on appeal is whether the trial court's findings were clearly erroneous or clearly against the preponderance of the evidence. *Murphy v. City of West Memphis*, 352 Ark. 315, 101 S.W.3d 221 (2003). A finding is clearly erroneous when, although there is evidence to support it, the reviewing court, when considering all of the evidence, is left with a definite and firm conviction that a mistake has been committed. *Id.* This court views the evidence in a light most favorable to the appellee. *Id.*

The evidence, as related above, was introduced by the testimony of Rhonda Hedges, a litigation analyst for Citibank, and copies of account statements sent to Jones's address in Hot

[1] Jones also appeals on the basis that the trial court erred by not granting her motion for directed verdict.

Springs Village. Therefore, this case is squarely on point with *Danner v. Discover Bank*, 99 Ark. App. 71, ___ S.W.3d ___ (2007). In *Danner*, our court referenced 15 U.S.C. 1643 (b) from the Truth in Lending Act, which provides:

> In any action by a card issuer to enforce liability for the use of a credit card, the burden of proof is upon the card issuer to show that the use was authorized or, if the use was unauthorized, then the burden of proof is on the card issuer to show that the conditions of liability for the unauthorized use of a credit card, as set forth in subsection (a) of this section have been met.

Danner, 99 Ark. App. at 72, ___ S.W.3d at ___. The *Danner* court then cited *Crestar Bank v. Cheevers*, 744 A. 2d 1043 (D.C. Cir. 2000), and held that the bank's account records, a history of prior payment, and an absence of a timely objection to the charges, are not enough to infer an authorization or ratification of the charges without impermissibly shifting the burden of proof to the cardholder. *Danner*, 99 Ark. App. at 72, ___ S.W.3d at ___. The exact situation is present in this case. We therefore follow the precedent of *Danner*. In so holding, we conclude that the judgment entered by the trial court in favor of Citibank is against the preponderance of the evidence, and we reverse.

However, as in *Danner,* we do not dismiss the case. It has long been the rule that where there is a simple failure of proof, justice requires that the court remand the case to allow the appellee the opportunity to supply the defect. Only where the record affirmatively shows that there can be no recovery on retrial should the case be dismissed in the appellate court. *Danner*, 99 Ark. App. at 73, ___ S.W.3d at ___; *Little Rock Newspapers, Inc. v. Dodrill*, 281 Ark. 25, 660 S.W.2d 933 (1983); *Southwestern Underwriters Ins. Co. v. Miller*, 254 Ark. 387, 493 S.W.2d 432 (1973).

We note that there is no prescribed method of proof. *Danner* mentions several types of evidence that could have been presented by the bank but were not, namely, a signed credit-card application, a cardholder's agreement, or the charge slips. None of these were presented in this case either.Subsequent to *Danner*, our court, in *Calvary SPV v. Anderson*, 99 Ark. App. 309, ___ S.W.3d ____ (2007), clarified that charge slips were not required as a matter of law to prove authorized charges.

While both parties in the instant case propounded extensive discovery requests to the other, the record does not reflect that either party was particularly responsive or that either party was very diligent in requiring responses. This opinion, like *Danner,* does not mandate a particular mode of proof, nor does it define the amount of proof necessary to establish a disputed account or an authorized charge. It merely follows established federal and state precedent holding that the account statements of the bank are not sufficient.

Reversed and remanded.

PITTMAN, C.J., and GLADWIN, GLOVER, and BAKER, JJ., agree.

BIRD, J., concurs.